

FILED  
07 SEP 23 11:11:32  
CLERK OF DISTRICT COURT  
SAN JOSE DISTRICT OF CALIFORNIA

TYLER M. PAETKAU, Bar No. 146305  
AISHA N. BARBEAU, Bar No. 245339  
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Attorneys for Defendants  
ALTAMIRA CORPORATION doing business as  
Arby's® roast beef restaurant and  
CHERRY CHASE INVESTORS

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Case No. **07 5027**

**HRL**

ROBERT McCARTHY,  
Plaintiff,

v.

ARBY'S ROAST BEEF RESTAURANT,  
ALTAMIRA CORPORATION and  
CHERRY CHASE INVESTORS,  
Defendants.

Case No. \_\_\_\_\_

**NOTICE TO FEDERAL COURT OF  
REMOVAL OF CIVIL ACTION  
PURSUANT TO 28 U.S.C. § 1331, 1441(b)  
AND 1446 (FEDERAL QUESTION)**

TO THE CLERK IN THE ABOVE-ENTITLED COURT AND TO PLAINTIFF  
ROBERT McCARTHY:

PLEASE TAKE NOTICE THAT Defendants, Altamira Corporation doing business as Arby's® roast beef restaurant and Cherry Chase Investors (hereinafter "Defendants"), hereby give Notice of Removal of the above-entitled action from the Santa Clara County Superior Court to the United States District Court for the Northern District of California, San Jose Division, and state as follows:

1. This action was commenced on July 24, 2007, by the Complaint filed in the Superior Court for the County of Santa Clara, entitled *Robert McCarthy v. Arby's Roast Beef Restaurant, Altamira Corporation, Cherry Chase Investors and Does 1 Through 10, Inclusive*, Case No. 107CV090439 (hereinafter "the Complaint").

1.

2. Without waiving any or all objections Defendants may have regarding the effectiveness of service of process, counsel for Defendants and counsel for Plaintiff agreed that Defendants first received copies of the Complaint on August 29, 2007. Therefore, any response by Defendants to the Complaint must be made on or before September 28, 2007. A true and correct copy of the Summons and Complaint is attached hereto as Exhibit A. A true and correct copy of the letter memorializing the agreement between counsel for Defendants and counsel for Plaintiff regarding Defendants' receipt of the Complaint is attached hereto as Exhibit B.

3. On September 27, 2007, Defendants filed an Answer to the Complaint in the Superior Court for the County of Santa Clara. A true and correct copy of the Answer is attached hereto as Exhibit C.

4. No further proceedings have been heard at the Superior Court for the County of Santa Clara.

5. The instant Notice of Removal is timely filed as it is within thirty (30) days of the agreed upon date of receipt of the initial pleading pursuant to 28 U.S.C. § 1446(b).

6. A copy of this Notice of Removal will be filed with the Clerk for the Superior Court of the State of California for Santa Clara County and served upon all parties as required by 28 U.S.C. § 1446(d).

### **JURISDICTION**

7. This is a suit of a wholly civil nature brought in a California court. The action is now pending in Santa Clara County, California. Venue is proper in this Court pursuant to 28 U.S.C. §§ 84(a), 1391 and 1446. This case may be removed to this Court by Defendants pursuant to the provisions of 28 U.S.C. § 1441(b) as a result of the existence of original jurisdiction based on federal question.

### **INTRADISTRICT ASSIGNMENT**

8. All civil actions that arise in the county of Santa Clara shall be assigned to the San Jose Division. Northern District Civil Local Rule 3-2(c) and (e); 3-5(b). Further, assignment in the San Jose Division is proper because a substantial part of the events or omissions giving rise to the claim occurred and a substantial part of property that is the subject of the action is situated in the

County of Santa Clara, California. Northern District Civil Local Rule 3-2(c) and (e).

### **FEDERAL QUESTION**

9. Defendants are the owners and operators, lessors and/or lessees or agents, or agents of the owners lessors and/or lessees of Arby's® roast beef restaurant located at 601 South Bernardo Avenue, Sunnyvale, California, 94087-1020.

10. Upon information and belief, Plaintiff ROBERT McCARTHY (hereinafter "Plaintiff"), a disabled person, attempted to patronize Arby's® roast beef restaurant in the year of 2007, but claims that he was unable to do so and/or had difficulty doing so because the business was allegedly inaccessible. Plaintiff alleges that the business was inaccessible because the subject facilities do not comply with the ADA Access Guidelines For Buildings and Facilities. As a result, Plaintiff filed the Complaint. The Complaint alleges the following causes of action: (1) denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act; (2) denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and discrimination in violation of the California Unruh Act; and (3) violation of the California Business and Professions Code.

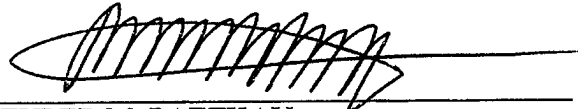
11. Because Plaintiff alleges that Defendants denied him access to a public accommodation in violation of the Americans with Disabilities Act, a federal statute, this action is a civil action arising under the laws of the United States of which this Court has original jurisdiction over pursuant to 28 U.S.C. § 1331. Defendants may remove this action to this Court pursuant to 28 U.S.C. §§ 1441(b) and 1446 because of the existence of original jurisdiction based on federal question. With respect to Plaintiff's California state law causes of action, these causes of action are removable pursuant to this Court's supplemental jurisdiction under 28 U.S.C. § 1367 because they are so related to the federal causes of action that they form part of the same case or controversy. Thus, this action is removable in its entirety.

12. Contemporaneously with the filing of this Notice of Removal in the United States District Court for the Northern District of California, Defendants will file a Notice of

1 Removal to Federal Court to Plaintiff, Plaintiff's Counsel and State Court (with its attachments) with  
2 the Clerk of the Superior Court for the County of Santa Clara. A true and correct of said Notice  
3 without attachments is attached hereto as Exhibit D.

4 Wherefore, having provided notice as is required by law, the above-entitled action  
5 should be removed from the Superior Court for the County of Santa Clara to this Court.

6 Dated: September 28, 2007

7   
8

9 TYLER M. PAETKAU  
10 LITTLER MENDELSON  
11 A Professional Corporation  
12 Attorneys for Defendants  
13 ALTAMIRA CORPORATION doing business  
14 as Arby's® roast beef restaurant  
15 and CHERRY CHASE INVESTORS

16 Firmwide:83166670.1 057642.1001  
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# EXHIBIT A

08-01-2007 02:23pm From-Pinnock Wakefield

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T-291 P.021/026 F-431

SUM-100

**SUMMONS  
(CITACION JUDICIAL)****NOTICE TO DEFENDANT:  
(AVISO AL DEMANDADO):****ARBY'S ROAST BEEF RESTAURANT; ALTAMIRA  
CORPORATION; CHERRY CHASE INVESTORS; AND DOES 1  
THROUGH 10****YOU ARE BEING SUED BY PLAINTIFF:  
(LO ESTÁ DEMANDANDO EL DEMANDANTE):  
ROBERT MCCARTHY**FOR COURT USE ONLY  
SOLO PARA USO DE LA CORTE  
**ENDORSED**

2007 JUL 24 A 9:14

CLERK OF SUPERIOR COURT  
COUNTY OF SANTA CLARA, CALIFORNIA  
J. Cao-Nguyen  
DEPUTY CLERK

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

Superior Court Of California For Santa Clara County  
191 North First Street, San Jose, CA 95113CASE NUMBER  
Número del Caso  
**CV 09 0439**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

David C. Wakefield, Pinnock &amp; Wakefield, 3033 Fifth Avenue, Suite 410, San Diego, CA 92103

Tel: 619.858.3671; Fax: 619.858.3671

DATE:

(Fecha)

Jul 24, 2007

Chief Executive Officer/Clerk Clerk, by  
(Secretario)

J. Cao-Nguyen

Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

**NOTICE TO THE PERSON SERVED: You are served**

1. ☐ as an individual defendant;  
2. ☐ as the person sued under the fictitious name of (specify):

3. ☒ on behalf of (specify): **Altamira Corporation**

- under: ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)  
☐ other (specify):

4. ☐ by personal delivery on (date):Form Adopted for Mandatory Use  
Adopted by Council of California  
SUM-100 (Rev. January 1, 2004)**SUMMONS**Page 1 of 1  
Code of Civil Procedure §§ 412.20, 405  
American LegalNet, Inc. [www.CourtForms.com](http://www.CourtForms.com)

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08-01-2007 02:22pm From-Pinnock Wakefield

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T-201 P.019/026 F-491

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): <b>DAVID C. WAKEFIELD, ESQ. SBN: 185736</b> <b>PINNOCK &amp; WAKEFIELD, APC</b> <b>3033 FIFTH AVENUE, SUITE 410</b> <b>SAN DIEGO, CA 92103</b> TELEPHONE NO. <b>619.858.3671</b> FAX NO. <b>619.858.3646</b>		FOR COURT USE ONLY  <b>ENDORSED</b>  2007 JUL 24 A 9 4  JUDGE: <b>J. Gao Nguyen</b> DEPT:
ATTORNEY FOR (Name): <b>Plaintiff Robert McCarthy</b> SUPERIOR COURT OF CALIFORNIA, COUNTY OF <b>Santa Clara</b> STREET ADDRESS: <b>191 North First Street</b> MAILING ADDRESS: CITY AND ZIP CODE: <b>San Jose, CA 95113</b> BRANCH NAME: <b>Downtown Superior Court</b>		
CASE NAME: <b>Robert McCarthy v ARBY'S ROAST BEEF RESTAURANT, et al.</b>		
<b>CIVIL CASE COVER SHEET</b> <input checked="" type="checkbox"/> <b>Unlimited</b> (Amount demanded exceeds \$25,000)	<input type="checkbox"/> <b>Limited</b> (Amount demanded is \$25,000 or less)	
<b>Complex Case Designation</b> <input type="checkbox"/> <b>Counter</b> <input type="checkbox"/> <b>Joinder</b> Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)		CASE NUMBER: <b>107 CV 090439</b>  JUDGE: DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

<b>Auto Tort</b> <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) <b>Other P/DP/WD (Personal Injury/Property Damage/Wrongful Death) Tort</b> <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other P/DP/WD (23) <b>Non-P/DP/WD (Other) Tort</b> <input type="checkbox"/> Business tort/unfair business practice (07) <input checked="" type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-P/DP/WD tort (35) <b>Employment</b> <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	<b>Contract</b> <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (08) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) <b>Real Property</b> <input type="checkbox"/> Eminent domain/inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) <b>Unlawful Detainer</b> <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) <b>Judicial Review</b> <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	<b>Provisionally Complex Civil Litigation</b> (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) <b>Enforcement of Judgment</b> <input type="checkbox"/> Enforcement of judgment (20) <b>Miscellaneous Civil Complaint</b> <input type="checkbox"/> RICO (27) <input type="checkbox"/> Other complaint (not specified above) (42) <b>Miscellaneous Civil Petition</b> <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties	d. <input type="checkbox"/> Large number of witnesses
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve	e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. <input type="checkbox"/> Substantial amount of documentary evidence	f. <input type="checkbox"/> Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☒ punitive

4. Number of causes of action (specify): 3

5. This case ☐ is ☒ is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: 7-19-2007  
 David C. Wakefield

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

<b>NOTICE</b>	
• Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions. • File this cover sheet in addition to any cover sheet required by local court rule. • If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding. • Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.	

 Form Adopted for Mandatory Use  
 Judicial Council of California  
 CM-010 (Rev. July 1, 2007)

## CIVIL CASE COVER SHEET

 Cal. Rules of Court, rules 2.90, 3.220, 3.400-3.402, 3.740,  
 Cal. Standards of Judicial Administration, std. 3.10  
[www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)

American LegalNet, Inc.

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**PINNOCK & WAKEFIELD**

A Professional Corporation

David C. Wakefield, Esq. Bar # 185736

3033 Fifth Avenue, Suite 410

San Diego, CA 92103

Telephone: 619.858.3671

Facsimile: 619.858.3646

Attorneys for Plaintiffs

**ENDORSED**

2007 JUL 24 A. 9:14

RECEIVED  
 CLERK OF COURT  
 SUPERIOR COURT  
 COUNTY OF SANTA CLARA  
 BY: Cao-Nguyen  
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**SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
 COUNTY OF SANTA CLARA**

**ROBERT McCARTHY,****Plaintiff,****v.**

**ARBY'S ROAST BEEF  
 RESTAURANT; ALTAMIRA  
 CORPORATION; CHERRY CHASE  
 INVESTORS; AND DOES 1  
 THROUGH 10, Inclusive,  
 Defendants.**

**Case No.: 107CV090439****COMPLAINT****DISCRIMINATORY PRACTICES IN  
PUBLIC ACCOMMODATIONS**

**[42 U.S.C. 12182(a) ET. SEQ; CA CIVIL  
 CODE 51, 52, 54, 54.1, 54.3; CA  
 HEALTH & SAFETY CODE § 19953;  
 CA BUSINESS & PROFESSIONS Code  
 § 17200]**

**DEMAND FOR JURY TRIAL****[F.R.Civ.P. rule 38(b)]**

**UNLIMITED CIVIL CASE - AMOUNT  
 DEMANDED EXCEEDS \$25,000.00;  
 PERMANENT INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiff ROBERT McCARTHY herein complains, by filing this Civil Complaint in  
 accordance with rules of Civil Procedure in the Superior Court For The State Of California, that  
 Defendants have in the past, and presently are, engaging in discriminatory practices against

**COMPLAINT  
 CASE #**

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1 individuals with disabilities. Plaintiff alleges this civil action and others substantial similar thereto  
2 are necessary to compel access compliance because empirical research on the effectiveness of Title  
3 III of the Americans with Disabilities Act indicates this Title has failed to achieve full and equal  
4 access simply by the executive branches of the Government funding and promoting voluntary  
5 compliance efforts. Further, empirical research shows when individuals with disabilities give  
6 actual notice of potential access problems to places of public accommodation without a civil rights  
7 action, the public accommodations do not remove the access barriers. Therefore, Plaintiff makes  
8 the following allegations in this federal civil rights action:

9 2. The property that is the subject of this action is located in Santa Clara County.

10 3. Venue is proper in Santa Clara County because a substantial part of Plaintiffs' claims arose  
11 within Santa Clara County and the property that is the subject of this action is situated in Santa  
12 Clara County.

13  
14 **NAMED DEFENDANTS AND NAMED PLAINTIFF**

15 4. Defendants are, and, at all times mentioned herein, were, a business or corporation or  
16 franchise organized and existing and/or doing business under the laws of the State of California.  
17 Plaintiff is informed and believes and thereon alleges that Defendant ARBY'S ROAST BEEF  
18 RESTAURANT is located at 601 South Bernardo Avenue, Sunnyvale, California, 94087-1020.  
19 Plaintiff is informed and believes and thereon alleges that Defendant ALTAMIRA  
20 CORPORATION is the owner, operator, and/or franchisee of the ARBY'S ROAST BEEF  
21 RESTAURANT located at 601 South Bernardo Avenue, Sunnyvale, California, 94087-1020.  
22 Defendant ALTAMIRA CORPORATION is located at P.O. Box 11626, San Rafael, California,  
23 94912-1626. Plaintiff is informed and believes and thereon alleges that Defendant CHERRY  
24 CHASE INVESTORS is the owner, operator, and/or lessor of the real property located at 601  
25 South Bernardo Avenue, Sunnyvale, California, 94087-1020, Assessor Parcel Number 198-16-02.  
26 Defendant CHERRY CHASE INVESTORS is located in San Jose, California.

27 5. The words Plaintiffs and Plaintiff as used herein specifically include ROBERT  
28

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T-291 P.004 F-491

1 McCARTHY.

2 6. Defendants Does 1 through 10, were at all times relevant herein subsidiaries, employers,  
3 employees, agents, of ARBY'S ROAST BEEF RESTAURANT; ALTAMIRA CORPORATION;  
4 and/or CHERRY CHASE INVESTORS. Plaintiff is ignorant of the true names and capacities of  
5 Defendants sued herein as Does 1 through 10, inclusive, and therefore sues these Defendants by  
6 such fictitious names. Plaintiff will pray leave of the court to amend this complaint to allege the  
7 true names and capacities of the Does when ascertained.

8 7. Plaintiff is informed and believes, and thereon alleges, that Defendants and each of them  
9 herein were, at all times relevant to the action, the owner, lessor, lessee, franchiser, franchisee,  
10 general partner, limited partner, agent, employee, representing partner, or joint venturer of the  
11 remaining Defendants and were acting within the course and scope of that relationship. Plaintiff is  
12 further informed and believes, and thereon alleges, that each of the Defendants herein gave consent  
13 to, ratified, and/or authorized the acts alleged herein to each of the remaining Defendants.

14  
15 **CONCISE SET OF FACTS**

16 8. Plaintiff ROBERT McCARTHY (hereinafter "MCCARTHY") has physical impairments  
17 and due to these impairments he has learned to successfully operate a wheelchair for mobility.  
18 Plaintiff MCCARTHY said physical impairments substantially limit one or more of the following  
19 major life activities including but not limited to: walking.

20 9. In year 2007, Plaintiff MCCARTHY went to Defendants' public accommodation facilities  
21 known as ARBY'S ROAST BEEF RESTAURANT, (hereinafter "ARBY'S") located at 601 South  
22 Bernardo Avenue, Sunnyvale, California, 94087-1020, Assessor Parcel Number 198-16-02, to  
23 utilize their goods and/or services accompanied by a friend. When Plaintiff MCCARTHY  
24 patronized Defendants' ARBY'S facilities, he was unable to use and/or had difficulty using the  
25 public accommodations' disabled parking, exterior path of travel, entrance, customer service  
26 counter, and men's restroom facilities including but not limited to the facilities were not accessible  
27 because they failed to comply with ADA Access Guidelines For Buildings and Facilities (hereafter  
28

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1 referred to as "ADAAG" and codified in 28 C.F.R. Part 36, App. A) and/or California's Title 24  
2 Building Code Requirements. Defendants failed to remove barriers to equal access within their  
3 public accommodation facilities known as the.

4 10. Plaintiff MCCARTHY personally experienced difficulty with said access barriers at  
5 ARBY'S. The following examples of known barriers to access are not an exhaustive list of the  
6 barriers to access that exist at Defendants' facilities. For example, at the entrance(s) to the parking  
7 lot facilities of ARBY'S, there fails to be the required disability signage informing patrons they  
8 may be fined or their vehicle may be towed if they unlawfully park in a disabled parking space.  
9 The parking facilities completely fail to have the required "Van Accessible" disabled parking.  
10 There is one (1) existing designated disabled parking space located next to the building, however  
11 this one (1) designated disabled parking space fails to have the required access aisle. The existing  
12 disabled parking space is fourteen feet (14') wide, again with no access aisle. The existing  
13 disabled parking space fails to be the proper size to accommodate a proper "Van Accessible"  
14 disabled parking space and "Van Accessible" access aisle as it is too narrow. As there fails to be  
15 the required "Van Accessible" disabled parking space and as the existing disabled parking space  
16 fails to have the required access aisle, Plaintiff MCCARTHY was forced to park his lift equipped  
17 van far away from the ARBY'S establishment and far away from other parked vehicles to allow  
18 Plaintiff MCCARTHY to safely use the van's deployable motorized access ramp. After being able  
19 to safely depart from his vehicle, Plaintiff MCCARTHY was then forced to maneuver his  
20 wheelchair through the rainy and slick parking lot and behind parked vehicles other than his own to  
21 access the entrance to the ARBY'S restaurant..

22 11. There fails to be a designated safe and accessible exterior path of travel leading from the  
23 public sidewalk to the entrance of the ARBY'S restaurant.

24 12. The entrance door to ARBY'S fails to have the required disability signage. Additionally,  
25 the customer service order and pick-up counter is too high to be accessible. The customer service  
26 counter is thirty-six inches (36") high and has a twelve inch (12") deep wooden slanted buffer  
27 attached to the front of the counter. As a result of the counter height and existence of the twelve  
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08-01-2007 02:20pm From:Pinnock Wakefield

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1 inch (12") buffer in the front, Plaintiff MCCARTHY found it extremely difficult to reach over this counter to conduct his transaction for food.

13. While patronizing the ARBY'S restaurant, Plaintiff MCCARTHY needed to use the restroom facilities. The men's restroom is located outside of the ARBY'S restaurant and towards the rear of the building. The men's restroom entrance door has an impermissible slot-type lock that requires tight grasping and/or twisting of the wrist to operate. As a result, Plaintiff MCCARTHY was not able to grasp and twist this locking mechanism to engage the lock. The commode seat protective cover dispenser fails to be accessible, as the commode blocks the dispenser and the dispenser is mounted too high to be accessible at fifty-three inches (53") above the finished floor. The commode seat is too low to be accessible, as the commode seat is a mere fifteen inches (15") high. Plaintiff MCCARTHY found it impossible to transfer from his wheelchair onto the low commode, as the commode was too far from the side wall. The front centerline of the commode is a mere eighteen and one-half inches (18 1/2") from the wall. Also, the rear centerline of the commode is twenty inches (20") from the wall. The urinal in this men's restroom also fails to be accessible, as the urinal lip is twenty inches (20") high. As a result, Plaintiff MCCARTHY was precluded from using the urinal. The operable parts of the paper towel dispenser are mounted too high to be accessible, as the operable parts are sixty-two inches (62") above the finished floor. Also, the bottom edge of the mirror is mounted too high, as the bottom edge is mounted forty-eight inches (48") above the finished floor. The lavatory sink hot water pipe and drainage pipe fail to have the required insulation.

14. Plaintiff can prove these barriers as Plaintiff conducted a preliminary survey of Defendants' facility. Plaintiff specifically alleges that Defendants knew, to a substantial certainty, that the architectural barriers precluded wheelchair access. First, Plaintiff will prove that Defendants had actual knowledge that the architectural barriers precluded wheelchair access and that the noncompliance with ADAAG as to accessible entrances was intentional. Second, due to the abundance of ADA information and constant news covers of ADA lawsuits, Defendants had actual knowledge of the ADA and decided deliberately not to remove architectural barriers. Third,

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1 Defendants have no plans to remodel. Fourth, Defendants had actual knowledge of ADA given all  
2 the ADA public awareness campaigns, the abundance of free ADA information and the media's  
3 constant ADA coverage. Fifth, a human being acting for the defendants made a conscious decision  
4 as to how to proceed given the presence of the architectural barriers. Plaintiff alleges any  
5 alternative methods preclude integration of wheelchair patrons, as it requires them to use a second-  
6 class entrance. Also, expert testimony will show the facility contained inaccessible features.  
7 Plaintiff alleges businesses often state that they have few customers with disabilities. Plaintiff  
8 alleges such customers avoid patronizing inaccessible businesses and are deterred from patronizing  
9 such businesses.

10 15. Plaintiff MCCARTHY intends to return to Defendants' public accommodation facilities in  
11 the immediate future. Plaintiff MCCARTHY is presently deterred from returning due to their  
12 knowledge of the barriers to access that exist at Defendants' facilities.

13 16. Pursuant to federal and state law, Defendants are required to remove barriers to their  
14 existing facilities. Further, Defendants had actual knowledge of their barrier removal duties under  
15 the Americans with Disabilities Act and the Civil Code before January 26, 1992. Also, Defendants  
16 should have known that individuals with disabilities are not required to give notice to a  
17 governmental agency before filing suit alleging Defendants failed to remove architectural barriers.

18 17. Plaintiff believes and herein alleges Defendants' facilities have access violations not directly  
19 experienced by Plaintiff MCCARTHY which would preclude or limit access by MCCARTHY and  
20 other persons with disabilities, potentially including but not limited to violations of the ADA, ADA  
21 Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A) and Title 24 of the California  
22 Building Code. Plaintiff alleges Defendants are required to utilize the ADA checklist for Readily  
23 Achievable Barrier Removal approved by the United States Department of Justice and created by  
24 Adaptive Environments.

25 18. Based on these facts, Plaintiff alleges he was discriminated against each time he patronized  
26 Defendants' facilities. Plaintiff MCCARTHY was extremely upset due to Defendants' conduct.

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**NOTICE**

19. Plaintiff is not required to provide notice to the defendants prior to filing a complaint. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9<sup>th</sup> Cir 2000).

**WHAT CLAIMS PLAINTIFF IS ALLEGING AGAINST EACH NAMED DEFENDANT**

20. ARBY'S ROAST BEEF RESTAURANT; ALTAMIRA CORPORATION; CHERRY CHASE INVESTORS; and Does 1 through 10 will be referred to collectively hereinafter as "Defendants."

21. Plaintiff aver that the Defendants are liable for the following claims as alleged below:

**DISCRIMINATORY PRACTICES IN PUBLIC ACCOMMODATIONS**

FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS- Claims Under The Americans

**With Disabilities Act Of 1990**

CLAIM I AGAINST ALL DEFENDANTS: Denial Of Full And Equal Access

22. Based on the facts plead at ¶¶ 8 - 18 above and elsewhere in this complaint, Plaintiff MCCARTHY was denied full and equal access to Defendants' goods, services, facilities, privileges, advantages, or accommodations. Plaintiff alleges Defendants are a public accommodation owned, leased and/or operated by Defendants. Defendants' existing facilities and/or services failed to provide full and equal access to Defendants' facility as required by 42 U.S.C. § 12182(a). Thus, Plaintiff MCCARTHY was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff MCCARTHY was denied equal access to Defendants' existing facilities.

23. Plaintiff ROBERT MCCARTHY has physical impairments as alleged in ¶ 9 above because his conditions affect one or more of the following body systems: neurological, musculoskeletal, special sense organs, and/or cardiovascular. Further, Plaintiff MCCARTHY said physical impairments substantially limits one or more of the following major life activities: walking. In addition, Plaintiff MCCARTHY cannot perform one or more of the said major life activities in the manner, speed, and duration when compared to the average person. Moreover, Plaintiff

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1 MCCARTHY has a history of or has been classified as having a physical impairment as required by  
2 42 U.S.C. § 12102(2)(A).

3  
4 **CLAIM II AGAINST ALL DEFENDANTS: Failure To Make Alterations In Such A Manner**  
5 **That The Altered Portions Of The Facility Are Readily Accessible And Usable By Individuals**  
6 **With Disabilities**

7 24. Based on the facts plead at ¶¶ 8 - 18 above and elsewhere in this complaint, Plaintiff  
8 ROBERT MCCARTHY was denied full and equal access to Defendants' goods, services, facilities,  
9 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or  
10 operated by Defendants. Defendants altered their facility in a manner that affects or could affect the  
11 usability of the facility or a part of the facility after January 26, 1992. In performing the alteration,  
12 Defendants failed to make the alteration in such a manner that, to the maximum extent feasible, the  
13 altered portions of the facility are readily accessible to and usable by individuals with disabilities,  
14 including individuals who use wheelchairs, in violation of 42 U.S.C. §12183(a)(2).

15 25. Additionally, the Defendants undertook an alteration that affects or could affect the usability  
16 of or access to an area of the facility containing a primary function after January 26, 1992.  
17 Defendants further failed to make the alterations in such a manner that, to the maximum extent  
18 feasible, the path of travel to the altered area serving the altered area, are readily accessible to and  
19 usable by individuals with disabilities in violation 42 U.S.C. §12183(a)(2).

20 26. Pursuant to 42 U.S.C. §12183(a), this failure to make the alterations in a manner that, to the  
21 maximum extent feasible, are readily accessible to and usable by individuals with disabilities  
22 constitutes discrimination for purposes of 42 U.S.C. §12183(a). Therefore, Defendants  
23 discriminated against Plaintiff in violation of 42 U.S.C. § 12182(a).

24 27. Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of 42  
25 U.S.C. § 12183(a), 42 U.S.C. §12182(a) and 42 U.S.C. §12188 because Plaintiff ROBERT  
26 MCCARTHY was denied equal access to Defendants' existing facilities.



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1 **CLAIM III AGAINST ALL DEFENDANTS: Failure To Remove Architectural Barriers**

2 28. Based on the facts plead at ¶ 8 - 18 above and elsewhere in this complaint, Plaintiff  
3 ROBERT McCARTHY was denied full and equal access to Defendants' goods, services, facilities,  
4 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or  
5 operated by Defendants. Defendants failed to remove barriers as required by 42 U.S.C. § 12182(a).  
6 Plaintiff is informed, believes, and thus alleges that architectural barriers which are structural in  
7 nature exist within the physical elements of Defendants' facilities in violation of Americans With-  
8 Disabilities Act Accessibility Guidelines (Codified in 28 C.F.R. Part 36, App. A; hereinafter  
9 "ADAAG") and Title 24 of the California Building Code. Title III requires places of public  
10 accommodation to remove architectural barriers that are structural in nature to existing facilities.  
11 [See, 42 United States Code 12182(b)(2)(A)(iv).] Failure to remove such barriers and disparate  
12 treatment against a person who has a known association with a person with a disability are forms of  
13 discrimination. [See 42 United States Code 12182(b)(2)(A)(iv).] Thus, Plaintiff ROBERT  
14 McCARTHY was subjected to discrimination in violation of 42 United States Code  
15 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because he was denied equal access to Defendants'  
16 existing facilities.

17  
18 **CLAIM IV AGAINST ALL DEFENDANTS: Failure To Modify Practices, Policies And**  
19 **Procedures**

20 29. Based on the facts plead at ¶ 8 - 18 above and elsewhere in this complaint, Defendants  
21 failed and refused to provide a reasonable alternative by modifying its practices, policies and  
22 procedures in that they failed to have a scheme, plan, or design to assist Plaintiff and/or others  
23 similarly situated in entering and utilizing Defendants' services, as required by 42 U.S.C. §  
24 12188(a). Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination in violation of  
25 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT  
26 McCARTHY was denied equal access to Defendants' existing facilities.

27 30. Based on the facts plead at ¶ 8 - 18 above, Claims I, II, and III of Plaintiffs' First Cause Of  
28

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1 Action above, and the facts elsewhere herein this complaint, Plaintiff will suffer irreparable harm  
 2 unless Defendants are ordered to remove architectural, non-architectural, and communication  
 3 barriers at Defendants' public accommodation. Plaintiff alleges that Defendants' discriminatory  
 4 conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiff and a  
 5 substantial segment of the disability community. Plaintiff alleges there is a national public interest  
 6 in requiring accessibility in places of public accommodation. Plaintiff has no adequate remedy at  
 7 law to redress the discriminatory conduct of Defendants. Plaintiff desires to return to Defendants'  
 8 places of business in the immediate future. Accordingly, the Plaintiff alleges that a structural or  
 9 mandatory injunction is necessary to enjoin compliance with federal civil rights laws enacted for  
 10 the benefit of individuals with disabilities.

11 31. WHEREFORE, Plaintiff prays for judgment and relief as hereinafter set forth.

12  
 13 SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS - CLAIMS UNDER  
 14 CALIFORNIA ACCESSIBILITY LAWS

15 CLAIM I: Denial Of Full And Equal Access

16 32. Based on the facts plead at ¶ 8 - 18 above and elsewhere in this complaint, Plaintiff  
 17 ROBERT McCARTHY was denied full and equal access to Defendants' goods, services, facilities,  
 18 privileges, advantages, or accommodations within a public accommodation owned, leased, and/or  
 19 operated by Defendants as required by Civil Code Sections 54 and 54.1. Defendants' facility  
 20 violated California's Title 24 Accessible Building Code by failing to provide equal access to  
 21 Defendants' facilities.

22 33. These violations denied Plaintiff ROBERT McCARTHY full and equal access to  
 23 Defendants' facility. Thus, Plaintiff ROBERT McCARTHY was subjected to discrimination  
 24 pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff ROBERT McCARTHY was denied  
 25 full, equal and safe access to Defendants' facility, causing severe emotional distress.

26 CLAIM II: Failure To Modify Practices, Policies And Procedures

27 34. Based on the facts plead at ¶ 8 - 18 above and elsewhere herein this complaint, Defendants  
 28

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1 failed and refused to provide a reasonable alternative by modifying its practices, policies, and  
2 procedures in that they failed to have a scheme, plan, or design to assist Plaintiff and/or others  
3 similarly situated in entering and utilizing Defendants' services as required by Civil Code § 54.1.  
4 Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of Civil Code §  
5 54.1.

6 **CLAIM III: Violation Of The Unruh Act**

7 35. Based on the facts plead at ¶ 8 - 18 above and elsewhere herein this complaint and because  
8 Defendants violated the Civil Code § 51 by failing to comply with 42 United States Code §  
9 12182(b)(2)(A)(iv) and 42 U.S.C. § 12183(a)(2), Defendants did and continue to discriminate  
10 against Plaintiff and persons similarly situated in violation of Civil Code §§ 51, 52, and 54.1.

11 36. Based on the facts plead at ¶ 8 - 18 above, Claims I, II, and III of Plaintiffs' Second Cause  
12 Of Action above, and the facts elsewhere herein this complaint, Plaintiff will suffer irreparable  
13 harm unless Defendants are ordered to remove architectural, non-architectural, and communication  
14 barriers at Defendants' public accommodation. Plaintiff alleges that Defendants' discriminatory  
15 conduct is capable of repetition, and this discriminatory repetition adversely impacts Plaintiff and a  
16 substantial segment of the disability community. Plaintiff alleges there is a state and national  
17 public interest in requiring accessibility in places of public accommodation. Plaintiff has no  
18 adequate remedy at law to redress the discriminatory conduct of Defendants. Plaintiff desires to  
19 return to Defendants' places of business in the immediate future. Accordingly, the Plaintiff alleges  
20 that a structural or mandatory injunction is necessary to enjoin compliance with state civil rights  
21 laws enacted for the benefit of individuals with disabilities.

22 37. Wherefore, Plaintiff prays for damages and relief as hereinafter stated.

23  
24 **Treble Damages Pursuant To Claims I, II, III Under The California Accessibility Laws**

25 38. Defendants, each of them respectively, at times prior to and including the day Plaintiff  
26 patronized Defendants' facilities, and continuing to the present time, knew that persons with  
27 physical disabilities were denied their rights of equal access to all portions of this public facility.  
28

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1 Despite such knowledge, Defendants, and each of them, failed and refused to take steps to comply  
2 with the applicable access statutes; and despite knowledge of the resulting problems and denial of  
3 civil rights thereby suffered by Plaintiff and other similarly situated persons with disabilities.

4 Defendants, and each of them, have failed and refused to take action to grant full and equal access  
5 to persons with physical disabilities in the respects complained of hereinabove. Defendants, and  
6 each of them, have carried out a course of conduct of refusing to respond to, or correct complaints  
7 about, denial of disabled access and have refused to comply with their legal obligations to make  
8 Defendants' public accommodation facilities accessible pursuant to the Americans With Disability  
9 Act Access Guidelines (ADAAG) and Title 24 of the California Code of Regulations (also known  
10 as the California Building Code). Such actions and continuing course of conduct by Defendants,  
11 and each of them, evidence despicable conduct in conscious disregard of the rights and/or safety of  
12 Plaintiff and of other similarly situated persons, justifying an award of treble damages pursuant to  
13 sections 52(a) and 54.3(a) of the California Civil Code.

14 39. Defendants, and each of their actions have also been oppressive to persons with physical  
15 disabilities and of other members of the public, and have evidenced actual or implied malicious  
16 intent toward those members of the public, such as Plaintiff and other persons with physical  
17 disabilities who have been denied the proper access to which they are entitled by law. Further,  
18 Defendants, and each of their, refusals on a day-to-day basis to correct these problems evidence  
19 despicable conduct in conscious disregard for the rights of Plaintiff and other members of the  
20 public with physical disabilities.

21 40. Plaintiff prays for an award of treble damages against Defendants, and each of them,  
22 pursuant to California Civil Code sections 52(a) and 54.3(a), in an amount sufficient to make a  
23 more profound example of Defendants and encourage owners, lessors/lessees, and operators of  
24 other public facilities from willful disregard of the rights of persons with disabilities. Plaintiff does  
25 not know the financial worth of Defendants, or the amount of damages sufficient to accomplish the  
26 public purposes of section 52(a) of the California Civil Code and section 54.3 of the California  
27 Civil Code.  
28

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41. Wherefore, Plaintiff prays for damages and relief as hereinafter stated.

THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS - Violation of Business and Professions Code section 17200 et seq.

42. Plaintiff incorporates by reference herein the facts plead at ¶¶ 8-18 above and elsewhere in this complaint.

43. Pursuant to federal law, Defendants are required to remove barriers to their existing facilities. Title III of the Americans With Disabilities Act requires places of public accommodation to remove architectural barriers that are structural in nature to existing facilities. [42 United States Code 12182(b)(2)(A)(iv).] Failure to remove such barriers and disparate treatment against a person who has a known association with a person with a disability are forms of discrimination. [See 42 United States Code 12182(b)(2)(A)(iv).] Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT MCCARTHY was denied equal access to Defendants' existing facilities. Also, Defendants' facilities failed to provide full and equal access to Defendants' facility as required by 42 U.S.C. § 12182(a). Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff ROBERT MCCARTHY was denied equal access to Defendants' existing facilities. Additionally, as a result of said access barriers, Defendants failed and refused to provide a reasonable alternative by modifying its practices, policies and procedures in that they failed to have a scheme, plan, or design to assist Plaintiff ROBERT MCCARTHY and/or others similarly situated in entering and utilizing Defendants' services, as required by 42 U.S.C. § 12188(a). Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination in violation of 42 United States Code 12182(b)(2)(A)(iv) and 42 U.S.C. § 12188 because Plaintiff was denied equal access to Defendants' existing facilities.

44. Pursuant to state law, Defendants are also required to remove barriers to their existing facilities. These violations denied Plaintiff ROBERT MCCARTHY full and equal access to

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1 Defendants' facilities. Thus, Plaintiff ROBERT MCCARTHY was subjected to discrimination  
2 pursuant to Civil Code §§ 51, 52, and 54.1 because Plaintiff was denied full, equal and safe access  
3 to Defendants' facility. Further, Defendants' facility, and other goods, services, and/or facilities  
4 provided to the public by Defendants are not accessible to and usable by persons with disabilities as  
5 required by Health and Safety Code § 19955 which requires private entities to make their facility  
6 accessible before and after remodeling, and to remove architectural barriers on and after AB 1077  
7 went into effect. Additionally, Defendants failed and refused to provide a reasonable alternative by  
8 modifying its practices, policies, and procedures in that they failed to have a scheme, plan, or  
9 design to assist Plaintiff ROBERT MCCARTHY and/or others similarly situated in entering and  
10 utilizing Defendants' services as required by Civil Code § 54.1. Thus, Plaintiff ROBERT  
11 MCCARTHY was subjected to discrimination in violation of Civil Code § 54.1. Also, under the  
12 Unruh Act, Defendants violated the Civil Code § 51 by failing to comply with 42 United States  
13 Code 12182(b)(2)(A)(iv), Defendants did and continue to discriminate against Plaintiff ROBERT  
14 MCCARTHY and persons similarly situated in violation of Civil Code §§ 51, 52, and 54.1.  
15 Further, Defendants had actual knowledge of their barrier removal duties under the Americans with  
16 Disabilities Act, the California Civil Code, and the California Health & Safety Code before January  
17 26, 1992.

18 45. Business and Professions Code section 17200 defines "unfair competition" and prohibited  
19 activities as, "... any unlawful, unfair or fraudulent business act or practice and unfair, deceptive,  
20 untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section  
21 17500) of Part 3 of Division 7 of the Business and Professions Code." Defendants' acts and  
22 omissions alleged herein are violations of the above-enumerated federal and state statutory  
23 requirements and public policy and therefore constitute unfair competition and/or prohibited  
24 activities as such violations are *unlawful, unfair or fraudulent business acts or practices*.  
25 Defendants' alleged unlawful, unfair, or fraudulent business acts or practices are specifically  
26 prohibited by the specific introductory language of B&P section 17200 that is stated in the  
27  
28

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1 conjunctive. Consequently, Plaintiff alleges that Defendants' acts and omissions constitute a  
2 violation specifically of this section 17200 of the Business and Professions Code.

3 46. Title III of the ADA mandates removal of architectural barriers and prohibits disability  
4 discrimination. As well, Defendants' facility, and other goods, services, and/or facilities provided  
5 to the public by Defendants are not accessible to and usable by persons with disabilities as required  
6 by CA Health and Safety Code § 19955 which requires private entities to make their facility  
7 accessible before and after remodeling, and to remove architectural barriers on and after AB 1077  
8 went into effect.

9 47. Plaintiff seeks injunctive relief requiring Defendants to comply with the disabled access  
10 laws of the State of California at their facilities.

11 48. WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

12 **DEMAND FOR JUDGMENT FOR RELIEF:**

13 A. For general damages pursuant to Cal. Civil Code §§ 52 or 54.3;

14 B. For \$4,000 in damages pursuant to Cal. Civil Code § 52 for each and every offense of Civil  
15 Code § 51, Title 24 of the California Building Code, ADA, and ADA Accessibility Guidelines  
16 (Codified in 28 C.F.R. Part 36, App. A);

17 C. In the alternative to the damages pursuant to Cal. Civil Code § 52 in Paragraph B above, for  
18 \$1,000 in damages pursuant to Cal. Civil Code § 54.3 for each and every offense of Civil Code §  
19 54.1, Title 24 of the California Building Code, ADA, and ADA Accessibility Guidelines;

20 D. For injunctive relief pursuant to 42 U.S.C. § 12188(a), CA Business & Professions Code §  
21 17200, and CA Health & Safety Code §19955. Plaintiff requests this Court enjoin Defendants to  
22 remove all architectural and communication barriers in, at, or on their facilities including without  
23 limitation violations of the ADA, ADA Accessibility Guidelines and Title 24 of the California  
24 Building Code;

25 E. For attorneys' fees pursuant to 42 U.S.C. § 1988, 42 U.S.C. § 12205, Cal. Code of Civil  
26 Procedure §§ 1032 and 1033.5, and Cal. Civil Code §§ 52, 54.3;

27 F. For treble damages pursuant to Cal. Civil Code §§ 52(a) or 54.3(a);  
28



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1 G. A Jury Trial and;  
2 H. For such other further relief as the court deems proper.

3  
4 Respectfully submitted:

5  
6  
7 Dated: July 19, 2007

PINNOCK & WAKEFIELD, A.P.C.

By: 

DAVID C. WAKEFIELD, ESQ.

Attorneys for Plaintiff

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**CIVIL LAWSUIT NOTICE**

Superior Court of California, County of Santa Clara  
191 N. First St., San Jose, CA 95113

ATTACHMENT A

CASE NUMBER: **107CV090439****READ THIS ENTIRE FORM**

**PLAINTIFFS** (the person(s) suing): Within 60 days after filing the lawsuit, you must serve each defendant with the Complaint, Summons, an Alternative Dispute Resolution (ADR) Information Sheet, and a copy of this Civil Lawsuit Notice, and you must file written proof of such service.

**DEFENDANTS** (the person(s) being sued): You must do each of the following to protect your rights:

1. You must file a written response to the Complaint, in the clerk's office of the Court, within 30 days of the date the Summons and Complaint were served on you;
2. You must send a copy of your written response to the plaintiff; and
3. You must attend the first Case Management Conference.

**Warning:** If you do not do these three things, you may automatically lose this case.

**RULES AND FORMS:** You must follow the California Rules of Court (CRC) and the Santa Clara County Superior Court Local Civil Rules and use proper forms. You can get legal information, view the rules and get forms, free of charge, from the Self-Service Center at 99 Notre Dame Avenue, San Jose (408-882-2900 x-2826), or from:

- State Rules and Judicial Council Forms: [www.courtinfo.ca.gov/forms](http://www.courtinfo.ca.gov/forms) and [www.courtinfo.ca.gov/rules](http://www.courtinfo.ca.gov/rules)
- Local Rules and Forms: [www.sccsuperiorcourt.org/civil/rule1toc.htm](http://www.sccsuperiorcourt.org/civil/rule1toc.htm)
- Rose Printing, 49 N. First St., San Jose (408-293-8177)

For other local information, visit the Court's Self-Service website [www.sccselfservice.org](http://www.sccselfservice.org) and select "Civil."

**CASE MANAGEMENT CONFERENCE (CMC):** You must meet with the other parties and discuss the case, in person or by telephone, at least 30 calendar days before the CMC. You must also fill out, file and serve a Case Management Statement (Judicial Council form CM-110) at least 15 calendar days before the CMC. You or your attorney must appear at the CMC. You may ask to appear by telephone – see Local Civil Rule 8.

Your Case Management Judge is: Neal A. Cabrinha

DEPT: 10

The first CMC is scheduled as follows: (Completed by Clerk of Court)

Date: DEC 18 2007 Time: 3:45 PM Dept.: 10

The next CMC is scheduled as follows: (Completed by party if the first CMC was continued or has passed)

Date: \_\_\_\_\_ Time: \_\_\_\_\_ Dept.: \_\_\_\_\_

**ALTERNATIVE DISPUTE RESOLUTION (ADR):** If all parties have appeared and filed a completed ADR Stipulation Form (local form CV-5008) at least 15 days before the CMC, the Court will cancel the CMC and mail notice of an ADR Status Conference. Visit the Court's website at [www.sccsuperiorcourt.org/civil/ADR/](http://www.sccsuperiorcourt.org/civil/ADR/) or call the ADR Administrator (408-882-2100 x-2156) for a list of ADR providers and their qualifications, services, and fees.

**WARNING:** Sanctions may be imposed if you do not follow the California Rules of Court or the Local Rules of Court.

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**SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA  
ALTERNATIVE DISPUTE RESOLUTION  
INFORMATION SHEET / CIVIL DIVISION**

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Many cases can be resolved to the satisfaction of all parties without the necessity of traditional litigation, which can be expensive, time consuming, and stressful. The Court finds that it is in the best interests of the parties that they participate in alternatives to traditional litigation, including arbitration, mediation, neutral evaluation, special masters and referees, and settlement conferences. Therefore, all matters shall be referred to an appropriate form of Alternative Dispute Resolution (ADR) before they are set for trial, unless there is good cause to dispense with the ADR requirement.

***What is ADR?***

ADR is the general term for a wide variety of dispute resolution processes that are alternatives to litigation. Types of ADR processes include mediation, arbitration, neutral evaluation, special masters and referees, and settlement conferences, among others forms.

***What are the advantages of choosing ADR instead of litigation?***

ADR can have a number of advantages over litigation:

- < ADR can save time. A dispute can be resolved in a matter of months, or even weeks, while litigation can take years.
- < ADR can save money. Attorney's fees, court costs, and expert fees can be reduced or avoided altogether.
- < ADR provides more participation. Parties have more opportunities with ADR to express their interests and concerns, instead of focusing exclusively on legal rights.
- < ADR provides more control and flexibility. Parties can choose the ADR process that is most likely to bring a satisfactory resolution to their dispute.
- < ADR can reduce stress. ADR encourages cooperation and communication, while discouraging the adversarial atmosphere of litigation. Surveys of parties who have participated in an ADR process have found much greater satisfaction than with parties who have gone through litigation.

***What are the main forms of ADR offered by the Court?***

- < Mediation is an informal, confidential process in which a neutral party (the mediator) assists the parties in understanding their own interests, the interests of the other parties, and the practical and legal realities they all face. The mediator then helps the parties to explore options and arrive at a mutually acceptable resolution of the dispute. The mediator does not decide the dispute. The parties do.
- < Mediation may be appropriate when:
  - < The parties want a non-adversary procedure
  - < The parties have a continuing business or personal relationship
  - < Communication problems are interfering with a resolution
  - < There is an emotional element involved
  - < The parties are interested in an injunction, consent decree, or other form of equitable relief

-OVER-

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ALTERNATIVE DISPUTE RESOLUTION INFORMATION SHEET/ CIVIL DIVISION

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08-01-2007 02:24pm From-Pinnock Wakefield

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T-291 P.026/026 F-431

- < Arbitration is a normally informal process in which the neutral (the arbitrator) decides the dispute after hearing the evidence and arguments of the parties. The parties can agree to binding or non-binding arbitration. Binding arbitration is designed to give the parties a resolution of their dispute when they cannot agree by themselves or with a mediator. If the arbitration is non-binding, any party can reject the arbitrator's decision and request a trial.

Arbitration may be appropriate when:

- < The action is for personal injury, property damage, or breach of contract
  - < Only monetary damages are sought
  - < Witness testimony, under oath, is desired
  - < An advisory opinion is sought from an experienced litigator (if a non-binding arbitration)
- < Neutral evaluation is an informal process in which a neutral party (the evaluator) reviews the case with counsel and gives a non-binding assessment of the strengths and weaknesses on each side and the likely outcome. The neutral can help parties to identify issues, prepare stipulations, and draft discovery plans. The parties may use the neutral's evaluation to discuss settlement.
- Neutral evaluation may be appropriate when:
- < The parties are far apart in their view of the law or value of the case
  - < The case involves a technical issue in which the evaluator has expertise
  - < Case planning assistance would be helpful and would save legal fees and costs
  - < The parties are interested in an injunction, consent decree, or other form of equitable relief
- < Special masters and referees are neutral parties who may be appointed by the court to obtain information or to make specific fact findings that may lead to a resolution of a dispute.
- Special masters and referees can be particularly effective in complex cases with a number of parties, like construction disputes.
- < Settlement conferences are informal processes in which the neutral (a judge or an experienced attorney) meets with the parties or their attorneys, hears the facts of the dispute, and normally suggests a resolution that the parties may accept or use as a basis for further negotiations.

Settlement conferences can be effective when the authority or expertise of the judge or experienced attorney may help the parties reach a resolution.

*What kind of disputes can be resolved by ADR?*

Although some disputes must go to court, almost any dispute can be resolved through ADR. This includes disputes involving business matters; civil rights; corporations; construction; consumer protection; contracts; copyrights; defamation; disabilities; discrimination; employment; environmental problems; harassment; health care; housing; insurance; intellectual property; labor; landlord/tenant; media; medical malpractice and other professional negligence; neighborhood problems; partnerships; patents; personal injury; probate; product liability; property damage; real estate; securities; and sports, among other matters.

*Where can you get assistance with selecting an appropriate form of ADR and a neutral for your case, for information about ADR procedures, or for other questions about ADR?*

Contact:  
Santa Clara County Superior Court  
ADR Administrator  
408-882-2530

Santa Clara County DRPA Coordinator  
408-792-2704

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ALTERNATIVE DISPUTE RESOLUTION INFORMATION SHEET/ CIVIL DIVISION

# EXHIBIT B



September 11, 2007

Aisha N. Barbeau  
Direct: 415.677.3157  
Direct Fax: 415.399.8490  
abarbeau@littler.com

VIA U.S. MAIL

David Wakefield, Esq.  
Pinnock & Wakefield  
A Professional Corporation  
3033 Fifth Avenue, Suite 410  
San Diego, CA 92103

Re: *Robert McCarthy v. Arby's Roast Beef, Altamira Corporation and Cherry Chase Investors*, filed in the California Superior Court, Santa Clara County, Case No. 107CV090439

Dear Mr. Wakefield:

I am writing on behalf of Altamira Corporation and Cherry Chase Investors. This letter confirms our discussion earlier today by phone in which I communicated to you that our clients dispute whether or not service of process has been effective in the above referenced matter. Without waiving any or all objections our clients may have regarding the effectiveness of service of process, you and I agreed that service was deemed effective on August 29, 2007, and accordingly our clients response to the Complaint is due on or before September 28, 2007. Please contact me if you have any questions or comments.

Very truly yours,

A handwritten signature in cursive script that reads "Aisha Barbeau".

Aisha N. Barbeau

# EXHIBIT C



1 TYLER M. PAETKAU, Bar No. 146305  
 2 AISHA N. BARBEAU, Bar No. 245339  
 3 LITTLER MENDELSON  
 4 A Professional Corporation  
 5 650 California Street  
 6 20th Floor  
 7 San Francisco, CA 94108.2693  
 8 Telephone: 415.433.1940

9 Attorneys for Defendants  
 10 ALTAMIRA CORPORATION doing business as  
 11 Arby's® roast beef restaurant and  
 12 CHERRY CHASE INVESTORS

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SANTA CLARA

15 ROBERT McCARTHY,

16 Plaintiff,

17 v.

18 ARBY'S ROAST BEEF RESTAURANT,  
 19 ALTAMIRA CORPORATION,  
 20 CHERRY CHASE INVESTORS  
 21 and DOES 1 through 10, inclusive,

22 Defendants.

Case No. 107CV090439

**DEFENDANTS ALTAMIRA  
 CORPORATION AND CHERRY CHASE  
 INVESTORS' ANSWER TO PLAINTIFF'S  
 UNVERIFIED COMPLAINT FOR  
 DAMAGES AND INJUNCTIVE RELIEF**

Dept: 10  
 Judge: Hon. Neal A. Cabrinha

23 Defendants ALTAMIRA CORPORATION doing business as Arby's® roast beef  
 24 restaurant and CHERRY CHASE INVESTORS (hereinafter "Defendants") answer Plaintiff  
 25 ROBERT McCARTHY'S (hereinafter "Plaintiff") unverified Complaint alleging discriminatory  
 26 practices in public accommodations in violation of the Americans with Disabilities Act,  
 27 discriminatory practices in public accommodations in violation of the California Civil Code and  
 28 unfair competition in violation of California's Business and Professions Code on file in the above-  
 entitled action as follows:

**GENERAL DENIAL**

Pursuant to California Code of Civil Procedure Section 431.30(d), Defendants hereby  
 answer the Complaint filed by Plaintiff by generally denying each and every allegation contained

therein, by denying that Plaintiff has been damaged or has sustained any damages as a result of the conduct alleged therein, and by asserting the following separate and distinct affirmative defenses:

### **AFFIRMATIVE DEFENSES**

As separate and distinct affirmative defenses to Plaintiff's unverified Complaint, Defendants allege as follows:

#### **FIRST AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that neither the Complaint, nor any cause of action set forth therein, states facts sufficient to constitute a cause of action against Defendants.

#### **SECOND AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's causes of action are barred, in whole or in part, by

all of the applicable statutes of limitation, including, but not limited to, California Code of Civil Procedure Sections 338 and 343 and California Business and Professions Code Section 17208.

### **THIRD AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims are barred, in whole or in part, because Plaintiff has not suffered, and will not suffer, irreparable harm as a result of any of the alleged conduct and/or omissions of Defendants.

### **FOURTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims for injunctive relief are barred, in whole or in part, because Plaintiff's legal remedies are adequate.

**FIFTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims are barred from any remedy, or certain remedies, under the doctrines of laches, waiver and/or estoppel.

**SIXTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff has failed to mitigate his alleged damages.

**SEVENTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act,

1 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 2 and policies and procedures in violation of the California Civil Code and for discrimination in  
 3 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 4 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 5 ROBERT McCARTHY)

6 Defendants allege that California Civil Code Sections 51, 52, 54, 54.1 and 54.3 and  
 7 California Health and Safety Code Sections 19955 et seq. do not create a private cause of action for  
 8 damages for alleged discrimination. Civil Code Section 55 provides only a private cause of action to  
 9 enjoin such alleged statutory violations.

10  
 11 **EIGHTH AFFIRMATIVE DEFENSE—**

12 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 13 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 14 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 15 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 16 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 17 and policies and procedures in violation of the California Civil Code and for discrimination in  
 18 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 19 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 20 ROBERT McCARTHY)

21 Assuming, *arguendo*, that Plaintiff was denied access to a place of public  
 22 accommodation, Defendants allege that such exclusion was not unlawful because access could not  
 23 be provided to Plaintiff without causing undue hardship to Defendants.

24 **NINTH AFFIRMATIVE DEFENSE—**

25 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 26 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 27 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 28 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,

1 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 2 and policies and procedures in violation of the California Civil Code and for discrimination in  
 3 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 4 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 5 ROBERT McCARTHY)

6 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility,  
 7 Defendants allege that such exclusion was not unlawful because access could not be provided to  
 8 Plaintiff without fundamentally altering the nature and/or character of the business establishment and  
 9 the goods and services provided therein.

10 **TENTH AFFIRMATIVE DEFENSE—**

11 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 12 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 13 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 14 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 15 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 16 and policies and procedures in violation of the California Civil Code and for discrimination in  
 17 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 18 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 19 ROBERT McCARTHY)

20 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility,  
 21 Defendants allege that such exclusion was not unlawful because barrier removal was not "readily  
 22 achievable."

23 **ELEVENTH AFFIRMATIVE DEFENSE—**

24 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 25 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 26 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 27 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 28 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices



1 and policies and procedures in violation of the California Civil Code and for discrimination in  
 2 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 3 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 4 ROBERT McCARTHY)

5 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility,  
 6 Defendants allege that such exclusion was not unlawful because the facility operated by Defendants  
 7 was not a newly constructed facility nor did it have any alterations, requiring compliance with Title  
 8 III of the American's with Disabilities Act, or Title 24 of the California Code of Regulations, during  
 9 the relevant time frame.

10 **TWELFTH AFFIRMATIVE DEFENSE—**

11 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 12 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 13 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 14 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 15 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 16 and policies and procedures in violation of the California Civil Code and for discrimination in  
 17 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 18 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 19 ROBERT McCARTHY)

20 Assuming, *arguendo*, that Plaintiff was denied access to the subject facility for the  
 21 reasons set forth in paragraph 10 and 11 of the Complaint, Defendants allege that they have no  
 22 liability for any such allegedly unlawful conditions because Defendants do not and have not exerted  
 23 custody and/or control over the parking area or sidewalk. Therefore, the party Defendants are  
 24 improperly joined.

25 **THIRTEENTH AFFIRMATIVE DEFENSE—**

26 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 27 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 28 and usable by individuals with disabilities, failure to remove architectural barriers and failure to



1 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 2 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 3 and policies and procedures in violation of the California Civil Code and for discrimination in  
 4 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 5 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 6 ROBERT McCARTHY)

7 Assuming, *arguendo*, that the facilities at issue were designed, developed,  
 8 constructed, modified and/or altered in violation of federal and/or California law, Defendants allege  
 9 that all legal requirements for access by disabled persons have been met through the obtaining of  
 10 necessary permits from appropriate legal authorities for the construction, alteration or modification  
 11 of the premises, and that Defendants reasonably relied on the actions of such legal authorities.

12 **FOURTEENTH AFFIRMATIVE DEFENSE—**

13 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 14 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 15 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 16 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 17 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 18 and policies and procedures in violation of the California Civil Code and for discrimination in  
 19 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 20 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 21 ROBERT McCARTHY)

22 Assuming, *arguendo*, that the facilities at issue were designed, developed,  
 23 constructed, modified and/or altered in violation of federal and/or California law, Defendants allege  
 24 that they had no such knowledge.

25 **FIFTEENTH AFFIRMATIVE DEFENSE—**

26 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 27 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 28 and usable by individuals with disabilities, failure to remove architectural barriers and failure to

1 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 2 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 3 and policies and procedures in violation of the California Civil Code and for discrimination in  
 4 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 5 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 6 ROBERT McCARTHY)

7 Defendants allege that they did not deny Plaintiff full and equal access to goods,  
 8 services, facilities, privileges, advantages or accommodations within a public accommodation  
 9 owned, leased and/or operated by Defendants as required by federal law, including, but not limited  
 10 to the Americans with Disabilities Act and/or California law, including, but not limited to Civil Code  
 11 §§ 51, 52, 54, 54.1, 54.3 and 55.

12 **SIXTEENTH AFFIRMATIVE DEFENSE—**

13 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 14 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 15 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 16 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 17 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 18 and policies and procedures in violation of the California Civil Code and for discrimination in  
 19 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 20 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 21 ROBERT McCARTHY)

22 Defendants allege that they provided Plaintiff with alternative methods for access to  
 23 the facility.

24 **SEVENTEENTH AFFIRMATIVE DEFENSE—**

25 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 26 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 27 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 28 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,

1 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 2 and policies and procedures in violation of the California Civil Code and for discrimination in  
 3 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 4 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 5 ROBERT McCARTHY)

6 Defendants allege that Plaintiff has failed to exhaust the administrative remedies  
 7 available to him.

8 **EIGHTEENTH AFFIRMATIVE DEFENSE—**

9 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 10 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 11 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 12 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 13 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 14 and policies and procedures in violation of the California Civil Code and for discrimination in  
 15 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 16 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 17 ROBERT McCARTHY)

18 Defendants allege that Plaintiff failed to notify Defendants of his need, if any, for  
 19 equivalent service and access or accommodation, and failed to allow Defendants the opportunity to  
 20 provide such.

21 **NINETEENTH AFFIRMATIVE DEFENSE—**

22 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 23 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 24 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 25 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 26 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 27 and policies and procedures in violation of the California Civil Code and for discrimination in  
 28 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the

1 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
2 ROBERT McCARTHY)

3 Defendants allege that the acts or omissions alleged were the proximate result of the  
4 conduct of third persons such that Defendants cannot be held liable for such acts or omissions, and  
5 that said third persons owe a duty to Defendants to indemnify it for any damages, attorney's fees  
6 and/or costs incurred as a result of this litigation.

7 **TWENTIETH AFFIRMATIVE DEFENSE—**

8 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
9 to make alterations in such a manner that the altered portions of the facility are readily accessible  
10 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
11 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
12 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
13 and policies and procedures in violation of the California Civil Code and for discrimination in  
14 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
15 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
16 ROBERT McCARTHY)

17 Defendants allege that the alleged acts or omissions to which Plaintiff refers that form  
18 the basis of Plaintiff's Complaint were done, if at all, in good faith, honestly and without malice and  
19 have not violated any rights Plaintiff may have under federal, state or local laws, regulations or  
20 guidelines.

21 **TWENTY-FIRST AFFIRMATIVE DEFENSE—**

22 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
23 to make alterations in such a manner that the altered portions of the facility are readily accessible  
24 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
25 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
26 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
27 and policies and procedures in violation of the California Civil Code and for discrimination in  
28 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the

1 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
2 ROBERT McCARTHY)

3 Defendants allege that the cost of some or all of the modifications to the subject  
4 properties that Plaintiff seeks to have imposed upon Defendant are disproportionate in terms of the  
5 cost and scope to that of any alterations made within the statutory period, if any.

6 **TWENTY-SECOND AFFIRMATIVE DEFENSE—**

7 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
8 to make alterations in such a manner that the altered portions of the facility are readily accessible  
9 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
10 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
11 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
12 and policies and procedures in violation of the California Civil Code and for discrimination in  
13 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
14 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
15 ROBERT McCARTHY)

16 Defendants allege that they granted Plaintiff access to Defendants' facilities, and if  
17 Plaintiff was in fact excluded from Defendants' facility, any such exclusion was for reasons  
18 rationally related to the services performed and the facilities provided by Defendants.

19 **TWENTY-THIRD AFFIRMATIVE DEFENSE—**

20 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
21 to make alterations in such a manner that the altered portions of the facility are readily accessible  
22 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
23 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
24 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
25 and policies and procedures in violation of the California Civil Code and for discrimination in  
26 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
27 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
28 ROBERT McCARTHY)

Defendants allege that they have fulfilled any obligation they may have had to reasonably accommodate Plaintiff's alleged disabilities.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that any and all actions taken by Defendants, or anyone acting on their behalf, if any, with respect to Plaintiff or the conditions of the establishment in question, were for lawful and legitimate, non-discriminatory reasons.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that the Complaint and each and every cause of action alleged therein is barred in that at all times relevant hereto, Defendants acted reasonably, in good faith and without malice, based upon the relevant facts and circumstances known to them at the time they



acted, if at all.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Defendants' services and/or facilities provided to the public are readily accessible to and usable by persons with disabilities as required by California and Federal laws, including, but not limited to, the Americans with Disabilities Act, California Civil Code §§ 51 et seq., California Civil Code §§ 54 et seq. and the California Health and Safety Code Part 5.5.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff was not a true customer of the restaurant, and that Plaintiff was merely a tester engaged in visiting Defendants' facilities in order to ascertain whether there were any purported Americans with Disabilities Act and/or related violations.



**TWENTY-EIGHTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Assuming, *arguendo*, that Plaintiff was denied access to the subject facility, Defendants allege that it would be structurally impracticable to design and construct the facility to make it reasonably accessible to people with disabilities.

**TWENTY-NINTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Assuming, *arguendo*, that Plaintiff was denied access to the subject facility, Defendants allege that such exclusion was not unlawful because the facility operated by Defendants was not a newly constructed facility, nor did it have any alterations requiring compliance with any applicable law during the relevant timeframe.

**THIRTIETH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that the prosecution of a representative action on behalf of the general public under California Business and Professions Code §§ 17200 et seq., as applied to the facts and circumstances of this case, would constitute a denial of Defendants' due process rights, both substantive and procedural, in violation of the California Constitution and the Fourteenth Amendment of the United States Constitution.

**THIRTY-FIRST AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff had equal access to the facilities at issue as non-disabled individuals.

**THIRTIETH-SECOND AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff is not legally entitled to recover any attorneys' fee with regard to this matter.

**THIRTY-THIRD AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff has failed to state facts sufficient to set forth claim(s) for punitive, treble and/or exemplary damages.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to

1 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 2 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 3 and policies and procedures in violation of the California Civil Code and for discrimination in  
 4 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 5 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 6 ROBERT McCARTHY)

7 Defendants allege that Plaintiff has failed to allege special damages with the requisite  
 8 degree of specificity.

9 **THIRTY-FIFTH AFFIRMATIVE DEFENSE—**

10 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 11 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 12 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 13 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 14 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
 15 and policies and procedures in violation of the California Civil Code and for discrimination in  
 16 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 17 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 18 ROBERT McCARTHY)

19 Defendants allege that Plaintiffs did not exercise due caution or care with respect to  
 20 matters alleged in the Complaint and if, in fact, Plaintiffs suffered any damage or injury, Plaintiffs  
 21 contributed in whole or in part to such damage or injury, and, therefore, any remedy or recovery to  
 22 which Plaintiffs might otherwise be entitled must be denied or reduced accordingly.

23 **THIRTY-SIXTH AFFIRMATIVE DEFENSE—**

24 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 25 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 26 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 27 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
 28 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices

1 and policies and procedures in violation of the California Civil Code and for discrimination in  
 2 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 3 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 4 ROBERT McCARTHY)

5 Defendants allege that California Civil Code §§ 54.3 and 55, providing for public  
 6 prosecution and private injunctive relief for violations of Civil Code § 54.1, are to be exclusive and  
 7 damages provided for by Civil Code § 52 are not recoverable for such violations.

8 **THIRTY-SEVENTH AFFIRMATIVE DEFENSE—**

9 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 10 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 11 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 12 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
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 14 and policies and procedures in violation of the California Civil Code and for discrimination in  
 15 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 16 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 17 ROBERT McCARTHY)

18 Defendants allege that they owed no duty of care toward Plaintiff.

19 **THIRTY-EIGHTH AFFIRMATIVE DEFENSE—**

20 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
 21 to make alterations in such a manner that the altered portions of the facility are readily accessible  
 22 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
 23 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
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 25 and policies and procedures in violation of the California Civil Code and for discrimination in  
 26 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
 27 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
 28 ROBERT McCARTHY)

Defendants allege that Plaintiff's alleged injuries and alleged damages, if any, were proximately caused and contributed to by the negligence of Plaintiff.

**THIRTY-NINTH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that Plaintiff's claims are barred from any remedy, or certain remedies, under the doctrines of unclean hands.

**FORTIETH AFFIRMATIVE DEFENSE—**

(AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure to make alterations in such a manner that the altered portions of the facility are readily accessible and usable by individuals with disabilities, failure to remove architectural barriers and failure to modify practices, policies and procedures all in violation of the Americans with Disabilities Act, SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices and policies and procedures in violation of the California Civil Code and for discrimination in violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF ROBERT McCARTHY)

Defendants allege that the provisions Plaintiff relies upon for an award of punitive or exemplary damages, and the substantive rules and procedures and standards for determining the amount and/or whether or not to award such damages, and if so, in what amount, violates the due process and equal protection rights of Defendants under the Constitutions of the United States and



1 California.

2 **FORTY-FIRST AFFIRMATIVE DEFENSE**

3 (AGAINST PLAINTIFF'S FIRST CAUSE OF ACTION for denial of full and equal access, failure  
4 to make alterations in such a manner that the altered portions of the facility are readily accessible  
5 and usable by individuals with disabilities, failure to remove architectural barriers and failure to  
6 modify practices, policies and procedures all in violation of the Americans with Disabilities Act,  
7 SECOND CAUSE OF ACTION for denial of full and equal access and failure to modify practices  
8 and policies and procedures in violation of the California Civil Code and for discrimination in  
9 violation of the California Unruh Act, and THIRD CAUSE OF ACTION for violation of the  
10 California Business and Professions Code BY ALL DEFENDANTS AGAINST PLAINTIFF  
11 ROBERT McCARTHY)

12 Defendants reserve the right to amend this answer should it later discover facts  
13 demonstrating the existence of new and/or additional affirmative defenses, and/or should a change in  
14 the law support the inclusion of new and/or additional defenses.

15 **PRAYER FOR RELIEF**

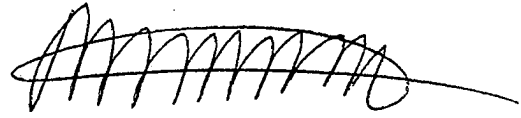
16 WHEREFORE, Defendants pray that:

- 17 1. Plaintiff take nothing by this action;
- 18 2. The Complaint be dismissed with prejudice;
- 19 3. Judgment be entered in favor of Defendants and against Plaintiff;
- 20 4. Defendants recover their attorneys' fees;
- 21 5. Defendants be awarded their costs of suit herein; and
- 22 6. Defendants be awarded such other and further relief as the Court deems just

23 and proper.



1 Dated: September 27, 2007

2  
3 

4 TYLER M. PAETKAU  
5 LITTLER MENDELSON  
6 A Professional Corporation  
7 Attorneys for Defendants  
8 ALTAMIRA CORPORATION doing business  
9 as Arby's® roast beef restaurant and  
10 CHERRY CHASE INVESTORS

11  
12 C:\Documents and Settings\abarbeau\Desktop\Altamira\Answer to Robert McCarthy's Complaint.doc  
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**PROOF OF SERVICE BY OVERNIGHT DELIVERY**

I am employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On September 27, 2007, I deposited with Federal Express, a true and correct copy of the within documents:

DEFENDANTS ALTAMIRA CORPORATION AND CHERRY  
CHASE INVESTORS' ANSWER TO PLAINTIFF'S UNVERIFIED  
COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

in a sealed envelope, addressed as follows:

Pinnock & Wakefield  
David C. Wakefield, Esq.  
3033 Fifth Avenue, Suite 410  
San Diego, CA 92103

Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 27, 2007, at San Francisco, California.



Susan A. Becerra

# EXHIBIT D

1 TYLER M. PAETKAU, Bar No. 146305  
 2 AISHA N. BARBEAU, Bar No. 245339  
 3 LITTLER MENDELSON  
 4 A Professional Corporation  
 5 650 California Street  
 6 20th Floor  
 7 San Francisco, CA 94108.2693  
 8 Telephone: 415.433.1940

9 Attorneys for Defendants  
 10 ALTAMIRA CORPORATION doing business as  
 11 Arby's® roast beef restaurant and  
 12 CHERRY CHASE INVESTORS

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SANTA CLARA

15 ROBERT McCARTHY,

Case No. 107CV090439

16 Plaintiff,

17 NOTICE TO PLAINTIFF, PLAINTIFF'S  
 18 COUNSEL AND STATE COURT OF  
 19 REMOVAL OF CIVIL ACTION  
 20 PURSUANT TO 28 U.S.C. § 1441(b)  
 21 (FEDERAL QUESTION)

22 v.

23 ARBY'S ROAST BEEF RESTAURANT,  
 24 ALTAMIRA CORPORATION, CHERRY  
 25 CHASE INVESTORS AND DOES 1  
 26 THROUGH 10, INCLUSIVE,

27 Dept: 10  
 28 Judge: Hon. Neal A. Cabrinha

29 Defendants.

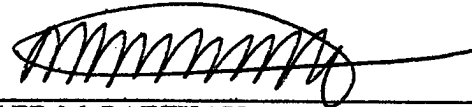
30 TO THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SANTA  
 31 CLARA, PLAINTIFF ROBERT McCARTHY and PLAINTIFF'S ATTORNEY OF RECORD:

32 PLEASE TAKE NOTICE that Defendants ALTAMIRA CORPORATION doing  
 33 business as Arby's® roast beef restaurant and CHERRY CHASE INVESTORS have on September  
 34 28, 2007, filed a Notice of Removal in the office of the Clerk of the United States District Court in  
 35 and for the Northern District of California pursuant to 28 U.S.C. §§ 1331, 1367, 1441(b) and 1446.  
 36 A true and correct copy of said Notice of Removal and accompanying exhibits are attached hereto  
 37 and incorporated herein by reference as Exhibit A.

38 PLEASE TAKE FURTHER NOTICE that, pursuant to 28 U.S.C. § 1446, the filing of  
 said Notice of Removal of Civil Action with the United States District Court, together with the filing

1 of said Notice of Removal of Civil Action with this Court, effects the removal of this action and this  
2 Court may proceed no further unless and until the case is remanded.

3 Dated: September 28, 2007

4  
5 

6 TYLER M. PAETKAU  
7 LITTLER MENDELSON  
8 A Professional Corporation  
9 Attorneys for Defendants  
10 ALTAMIRA CORPORATION doing business  
11 as Arby's® roast beef restaurant and  
12 CHERRY CHASE INVESTORS  
13  
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**CIVIL COVER SHEET**

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO.)

**I.(a) PLAINTIFFS**

Robert McCarthy

**DEFENDANTS**

Arby's Roast Beef Restaurant, Altamira Corporation, Cherry Chase Investors

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF  
(EXCEPT IN U.S. PLAINTIFF CASES)COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Marin  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

David C. Wakefield  
Pinnock & Wakefield  
3033 Fifth Avenue, Suite 410  
San Diego, CA 92103

ATTORNEYS (IF KNOWN)

Tyler M. Paetkau  
Aisha N. Barbeau  
Littler Mendelson  
650 California Street, 20<sup>th</sup> Floor  
San Francisco, CA 94015**II. BASIS OF JURISDICTION**

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1. U.S. Government Plaintiff
- ☐ 2. U.S. Government Defendant
- ☒ 3 Federal Question  
(U.S. Government Not a Party)
- ☐ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES**

(For Diversity Cases Only)

PLACE AN "X" IN ONE BOX FOR PLAINTIFF  
AND ONE BOX FOR DEFENDANT

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. ORIGIN**

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
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- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

**V. NATURE OF SUIT**

(PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury -Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Amer w/ disab - Empl <input checked="" type="checkbox"/> 446 Amer w/ disab - Other	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

**VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)**

Discriminatory Practices in violation of the Americans with Disabilities Act, 42 U.S.C Section 12182 et seq.

**VII. REQUESTED IN COMPLAINT:** ☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ \_\_\_\_\_ CHECK YES only if demanded in complaint:  
 UNDER F.R.C.P. 23 JURY DEMAND: ☒ YES ☐ NO

**VIII. RELATED CASE(S) IF ANY**

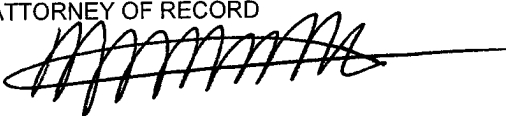
PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

**IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)**☐ SAN FRANCISCO/OAKLAND☒ SAN JOSE

DATE

SIGNATURE OF ATTORNEY OF RECORD

9/28/07



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ATTORNEYS (IF KNOWN)

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Aisha N. Barbeau  
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San Francisco, CA 94015**II. BASIS OF JURISDICTION**

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- ☐ 2 U.S. Government Defendant
- ☒ 3 Federal Question  
(U.S. Government Not a Party)
- ☐ 4 Diversity  
(Indicate Citizenship of Parties in Item III)

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(For Diversity Cases Only)

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- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
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| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

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- ☒ 2 Removed from State Court
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- ☐ 7 Appeal to District Judge from Magistrate Judgment

**V. NATURE OF SUIT**

(PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Amer w/ disab - Empl <input checked="" type="checkbox"/> 446 Amer w/ disab - Other	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609

**VI. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)**

Discriminatory Practices in violation of the Americans with Disabilities Act, 42 U.S.C Section 12182 et seq.

**VII. REQUESTED IN COMPLAINT:** ☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ \_\_\_\_\_ CHECK YES only if demanded in complaint:  
UNDER F.R.C.P. 23 JURY DEMAND: ☒ YES ☐ NO

**VIII. RELATED CASE(S) IF ANY** PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

**IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2)**  
(PLACE AND "X" IN ONE BOX ONLY)

☐ SAN FRANCISCO/OAKLAND☒ SAN JOSE

DATE

SIGNATURE OF ATTORNEY OF RECORD

9/28/07

